No. 83-990

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEETSMA,

Petitioners,

v.

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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OPINIONS AND ORDERS OF THE COURTS BELOW

The September 23, 1983 Opinion of the Sixth Circuit Court of Appeals and the Notice of Entry of Judgment, along with the August 16, 1982 Opinion and Judgment of the District Court, reported in 546 F. Supp. 1071, are in the Appendix to the Joint Petition for Writ of Certiorari filed December 15, 1983. References to that Petition and Appendix will be by page numbers, usually in parentheses.

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE SEPTEMBER 1983 DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER FEDERAL COURT OF APPEALS, AND IT FOLLOWS A LINE OF CASE AUTHORITY WHICH IS VIRTUALLY UNANIMOUS.

In affirming Judge Enslen's opinion, the Court of Appeals expressed its reliance upon six decisions of the U. S. Supreme Court. (37a). The most recent of these are: *Wolman* v *Walter,* 433 U.S. 229 (1977); *Meek* v *Pittenger,* 421 U.S. 349 (1975); *Committee for Public Education* v *Nyquist,* 413 U.S. 756 (1973); *Lemon* v *Kurtzman,* 403 U.S. 602 (1971). These and several other Supreme Court decisions were discussed and analyzed at some length by District Judge Enslen (96a-106a). Respondents especially call attention to the exhaustive analysis of *Lemon, Meek* and *Wolman* found at pages 100a-105a.

In practical effect, there is little or no difference between the aid device established by Petitioner Grand Rapids School District and the "purchase of secular services" device in *Lemon,* or the salary supplement device invalidated by this Court in *Earley* v *DiCenso,* 403 U.S. 602 (1971). The end result is to subsidize with tax dollars the teaching of important parts of the curriculum of sectarian schools. Where, as here, the religious schools receiving such instructional services are

sectarian in the sense that a substantial portion of their functions are subsumed in the religious mission of the institution (36a), there is no way to segregate secular and religious activities, and any government subsidy would constitute impermissible aid to the sectarian institution, in violation of the Establishment Clause.

The particular aid device of Petitioner Grand Rapids School District involved one feature not specifically found in the cited Supreme Court decisions, namely, a lease entered into between the public school district and each of the sectarian schools. The unique feature of this lease is that it does not expressly pertain to any described wing, floor or room in the parochial school but, rather, its impact accompanies the public school teacher into and about the building so that certain rooms are transformed into "public school" classrooms as and when the teacher convenes class there. As each room in this manner becomes a "public school", the students occupying the room become "public school students". The school district requires its teachers to carry and to post signs which identify each such area as a public school classroom. Also, each such classroom is "desanctified" by removing crucifixes, religious symbols, and artifacts, although such objects are permitted to remain in adjoining corridors, surrounding rooms, or other facilities used in connection with the leasehold. (5a). By this fictional lease device, Petitioner claimed to have transformed the students in each sectarian school building into "part-time public school students", thus enabling the school district to apply for and obtain State tax funds based upon the "full-time equivalent" number of students. (4a). As would be expected, this program was popular with the religious institutions which operated sectarian schools in the Grand Rapids area, and it expanded rapidly. (4a).

The lease was determined to be a fictional device to provide the public school district access to the sectarian schools, the

purpose of such access being to confer valuable educational services upon the religious school and its students. (22a) This was made clear by the fact that there were no public school students participating in the program; all students were enrolled full-time in the participating sectarian schools. (22a). This feature of "student body identity" existed in several lower court cases cited by District Judge Enslen. (22a, 23a). See the following:

> *Americans United for Separation of Church and State* v *Porter*, 485 F Supp 432 (WD Mich 1980)
>
> *Americans United for Separation of Church and State* v *Oakey*, 337 F Supp 545 (D Vt 1972)
>
> *Americans United for Separation of Church and State* v *Paire*, 359 F Supp 505 (D NH 1973)
>
> *Fisher* v *Clackamas County School District*, 13 Or App 56, 507 P 2d 839 (1973)
>
> *Americans United for Separation of Church and State* v *Beechwood School District*, 369 F Supp 1059 (ED Ky 1974)

All of these cases involved lease programs and, upon analysis, all provide support for the decisions in the instant case. This is not to say that the guiding principles are not adequately spelled out in the landmark cases of *Lemon*, *Earley Nyquist*, *Meek*, and *Wolman*, *supra*. Indeed, the 1980 decision in *Porter*, cited immediately above, contains a lengthy discussion and analysis of all of the mentioned Supreme Court cases, and that District Court relied heavily upon them in its decision. Thus, lower courts confronted with lease cases have found the decisions of this Court to be sufficiently explicit as precedents to establish a virtually unanimous line of authority. No additional pronouncement by this Court is needed.

There is only one case which is not in accord with this strong line of authority, that being *Citizens to Advance Public Education* v *State Superintendent of Public Instruction*, 65 Mich App 168 (1975), 237 NW2d 232, (Leave to appeal denied 397 Mich 854). Even in that case the Court acknowledged in a footnote at page 180 that its decision did not harmonize with the weight of authority.

Where it appears that *all* of the students who benefit from the Shared Time classes are enrolled in the sectarian school for the balance of their courses, it becomes obvious that the program is designed, not as a benefit to children, but to channel taxpayer funds to the *sectarian school*. This important point was highlighted in a case which Petitioners have wrongly cited (12, 13) in support of their position, *State of Nebraska ex rel School District of Hartington* v *Nebraska State Board of Education*, 188 Neb 1, 195 NW2d 161, cert denied 409 U.S. 921 (1972). The lease program there was upheld by the Nebraska Supreme Court, and certiorari was denied by the United States Supreme Court. The Opinion of Justice Brennan on denial and the dissenting Opinion of Justice Douglas make it clear that "students from both the public and the private school would attend these classes" held in two classrooms leased by Hartington Public School District from the Cedar Catholic High School. Indeed, Justice Brennan specifies the exact number—91 public school and 48 parochial school children. Thus, a good faith, arms-length lease of space in a parochial school was upheld *where the feature of "student body identity" was found not to exist*. Even so, there were strong dissenting opinions filed in both the Nebraska Supreme Court and the U.S. Supreme Court (Justice Douglas).

Also cited by Petitioners at page 13 is *National Coalition for Public Education and Religious Liberty* v *Harris*, 489 F Supp 1248 (SD NY 1980), appeal dismissed, 449 U.S. 808, rehearing denied, 449 U.S. 1028. This was a Title I case under the

Elementary and Secondary Education Act of 1965. While the aid program there was approved, there are important differences between that case and the instant case on the facts:

1. The schools in *Harris* were not pervasively sectarian, only religiously affiliated. 489 F. Supp at 1263. In such a school, religion does not pervade or permeate the entire program offered in the school, as is the case in the Grand Rapids sectarian schools.

2. The Court found the program produced "minor administrative contacts", but no impermissible administrative entanglement. Page 1269-70.

3. The Court found the program had not generated any divisive political potential. Page 1269-1270.

Summarizing the thrust of the mentioned decisions in this area of Constitutional law, Respondents believe that only one decision, *Citizens to Advance Public Education* v *State Superintendent of Public Instruction, supra*, runs contrary to the strong line of authority which mandates invalidating the instant programs. That case was decided in 1973 by a Michigan intermediate appellate court, not by a State Court of last resort. Subsequent to that decision, there have been two contrary decisions by the Federal District Court for the Western District of Michigan, being *Americans United for Separation of Church and State* v *Porter*, 485 F Supp 432 (1980), and the instant case decided by Judge Enslen in August 1982 and affirmed by the Sixth Circuit Court of Appeals September 23, 1983.

II.

IN ACCUSING THE COURTS BELOW OF A SIMPLISTIC *per se*, GEOGRAPHIC RULING THAT THE PROGRAM IS UNCONSTITUTIONAL MERELY BECAUSE CONDUCTED IN RELIGIOUS SCHOOLS, PETITIONERS IGNORE THE FINDINGS OF ADMINISTRATIVE, PERSONNEL, AND POLITICAL ENTANGLEMENT BETWEEN CHURCH AND STATE.

Petitioners allege a "flawless" operational history (46a) and cite *State of Nebraska ex rel School District of Hartington* v *Nebraska State Board of Education*, 188 Neb 1, 195 NW2d 161, cert denied 409 U.S. 921 (1972),[1] in characterizing this as just another public school educational program designed to "provide educational opportunities for our nation's youth" (20) and to "reach out to all students in the community" (24). See, however, page 4 of the Petition where they candidly acknowledge that these educational services were designed "to provide nonpublic school children with educational opportunities beyond the basic nonpublic school core curriculum." Throughout all the stages of this case in both Courts below, Petitioner Grand Rapids School District has placed great emphasis upon the process by which nonpublic school children are transformed into "public school students" for purposes of receiving these educational services. But here they openly admit that the programs are designed to benefit children enrolled in *nonpublic* schools. Having in mind that these schools were determined to be pervasively sectarian (36a, 115a), this admission of Petitioner raises the question whether the programs satisfy even the first element of this Court's three-part test, that is, whether they can be said to have a *secular purpose*.

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[1] This case is discussed above in Part I of this Brief. Far from being authority for Petitioners, it provides support for Respondents.

In the process of arranging for the furnishing of these educational services *on the premises of the sectarian schools,* Petitioner has left a trail of entanglement which threatened to bring about a virtual *merger* of the public and nonpublic school systems. See 30A-35a, quoting from District Court Opinion 116a-120a on administrative and personnel entanglement, and 27a-28a, quoting 112a-113a on findings of political divisiveness or political entanglement. The incredible, embarrassing dilemma created by Petitioner for teacher Kenneth Zandee is detailed at 32a, 118a, at which point the Court urges the need for monitoring of classes, and concludes:

> Without such monitoring the programs run the risk of enhancing religious views. If the courses are monitored, the programs are still infirm in that an excessive administrative entanglement is necessitated. In either case, the same ultimate result applies and the programs cannot be sustained.

Thus, contrary to Petitioners' claim, the Courts below did not adopt a simplistic per se rule of unconstitutionality based merely upon the place where classes were conducted. First, there was a finding based on "massive testimony and exhibits" that the sectarian schools involved were comparable in extent of religious commitment to those in *Lemon, supra.* (89a). Next, the Court observed the existence of a "student body identity" in identifying the beneficiaries of the program:

> Even when genuinely motivated by an undeniably secular purpose, government must not act so as to support a narrow group of religiously segregated beneficiaries. The challenged programs impact upon a very narrow religious class of beneficiaries. The narrowness of the benefited class was a crucial factor in *Nyquist* in striking down the tax relief program for parents of nonpublic school children

> where parochial school children composed over 80 percent of the benefited class. (23a, 108a).

In the instant case there was *complete identity* of the student body in the "public school" Shared Time classes and the nonpublic schools (22a, 107a), and "the beneficiaries of the program are wholly designated on the basis of religion". (24a, 109a). At 116a, the District Judge concluded:

> Though Defendants claim the Shared Time program is available to all students, the record is abundantly clear that only nonpublic school students wearing the cloak of a "public school student" can enroll in it.

Continuing the analysis under this Court's often-announced three-part test, the Courts below found the programs "have undeniably rendered direct benefits, both fir[illegible] and otherwise, to the sectarian institutions." (24a, 25a, 110a). And, finally, the entanglement noted above was a product of these direct benefits.

These findings and conclusions mandated a holding that the programs conflict with the Establishment Clause of the First Amendment.

The ultimate thrust of this case was the subject of a paragraph near the end of the majority opinion of the Court of Appeals. In part, the Court said:

> We recognize, of course, the increasing impact of Supreme Court majority approval of public funding for religiously neutral supplies and services which are provided to all schools, including parochial schools. If, however, what has been adopted by the Grand Rapids School Board were to be added to the list of such approvals, the separa-

tion of church and state will be effectively ended in the field of public education. (40a).

Citizens of this great nation should be constantly reminded that it is not a mere accident of history that we are virtually alone among the countries on earth in offering to all citizens complete freedom of religion. The simple but effective words of the first clause of the first Article of the Bill of Rights command that "Congress shall make no law respecting an establishment of religion" and this has been interpreted to mandate a separation of government from religion:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, *whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." *Everson* v *Board of Education,* 330 U.S. 1, (1947). (emphasis added)

The religious strife in Northern Ireland could not occur in our nation, which prohibits government support of religion and guarantees that no person's political rights shall depend in any way upon the religion he professes. The same is true

of many other troubled nations, including Iran, Lebanon and the Philippine Islands, where a union between the government and the dominant religion has reduced dissenters to the role of rebels against the government.

In this nation where more than 250 different religions and denominations co-exist, we have found the key to religious harmony which has eluded all other peoples and nations for more than 2,000 years. And that key consists of those ten magic words comprising the "Establishment Clause".

In order to preserve that religious harmony and prevent the kind of divisiveness described by the Court of Appeals at 26a-29a, we must continue to turn back all attempts by religious groups to use the powers and functions of government for their advantage.

III.

THE INDIVIDUAL PLAINTIFFS (RESPONDENTS HEREIN) HAVE STANDING TO ATTACK THESE EDUCATIONAL PROGRAMS UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

At the conclusion of the eight-day trial in District Court in May 1982, Petitioners raised, for the first time, the issue of standing. (67a). It was briefed and argued, following which Judge Enslen dismissed the organizational Plaintiff, but held that the individual Plaintiffs had standing under *Flast* v *Cohen,* 392 U.S. 83 (1968), to attack these programs. (67a-70a).

There seems little question that the individual Plaintiffs possess requisite standing, as was candidly acknowledged by Dissenting Judge Krupansky. (62). The problem is one of pleading, as he analyzed it:

> Had plaintiffs challenged the constitutionality of these Michigan legislative enactments, they may possibly have invoked tax payer standing under the criteria of *Flast* and *Valley Forge*.

As early as the discovery phase of this case, and later in exhibits offered by Petitioners at trial, the statutory authority for the Shared Time program and state tax funding for it were revealed. The specific statutes are cited and discussed by Judge Enslen (70a-72a), and much of that material came from an exhibit offered by Petitioner State Board of Education as Exhibit SBE-A. Thus, the legislative acts which, according to Dissenting Judge Krupansky, should have been specifically pleaded by Plaintiffs were a part of the evidence produced at or before trial.

Respondents believe Rule 15(b), Federal Rules of Civil Procedure, which allows an amendment at any time in furtherance of justice, was intended to correct this kind of technical deficiency in pleading:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Rule 15(c) provides that such amendment relates back to the date of the original pleading.

IV.

CONCLUSION AND RELIEF REQUESTED.

Respondents urge that the Writ of Certiorari be denied.

In the alternative, the Writ should be granted for the purpose of summarily affirming the decision of the Sixth Circuit Court of Appeals rendered September 23, 1983.

Respectfully submitted,

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